(8)

No. 99-804

In the Supreme Court of the United States

CARL W. CLEVELAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the federal mail fraud statute, 18 U.S.C. 1341, reaches a scheme to obtain a video poker license from the State of Louisiana by means of false representations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Summary of the argument	5
Argument:	
Petitioner's scheme to obtain a video poker license by providing false information to the State through the mails violated the mail fraud statute	9
I. A scheme to obtain property through fraudulent means violates the mail fraud statute, whether or not the scheme was one to deprive a victim of property	10
A. The second clause of 18 U.S.C. 1341 does not require that a victim be deprived of money or property, so long as the defendant obtained money or property	10
B. The scheme in this case violated the second clause of Section 1341 because petitioner sought to "obtain[] property" in the form of a state video poker license	20
C. The indictment charged and the jury necessarily found that petitioner engaged in a scheme to obtain property in violation of the second clause of Section 1341	25
II. Petitioner violated the mail fraud statute by engaging in a scheme to deprive the State of an interest in property	27

Table of Contents—Continued: Page

A. The Louisiana Video Draw Poker Device Control Law vests the State with a financial stake in video poker licenses and with control over how the licenses are used 28
B. The State has a property interest in video poker licenses 32
C. Congress's enactment of 18 U.S.C. 1346 has no bearing on any issue presented in this case 42
Conclusion 45
Appendix A 1a
Appendix B 2a
Appendix C 5a

TABLE OF AUTHORITIES

Cases:

Badders v. *United States*, 240 U.S. 391 (1916) 42
Barry v. *Barchi*, 443 U.S. 55 (1979) 7, 21
Beauchamp v. *De Abadia*, 779 F.2d 773 (1st Cir. 1985) 21
Bell v. *Burson*, 402 U.S. 535 (1971) 7, 21
Bogus v. *American Nat'l Bank of Cheyenne*, 401 F.2d 458 (10th Cir. 1968) 22
Borre v. *United States*, 940 F.2d 215 (7th Cir. 1991) 37-38, 39, 40
Branch v. *Jesup*, 106 U.S. 468 (1883) 38
California v. *Central Pac. R.R.*, 127 U.S. 1 (1888) 37
Carpenter v. *United States*, 484 U.S. 19 (1987) 21, 36, 41
Consolidated Fruit Jar Co. v. *Wright*, 94 U.S. 92 (1877) 34
Dayton Bd. of Educ. v. *Brinkman*, 433 U.S. 406 (1977) 19

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Drye v. *United States*, 120 S. Ct. 474 (1999) 22, 25
Durland v. *United States*, 161 U.S. 306 (1896) 17
FCC v. *Pacifica Found.*, 438 U.S. 726 (1978) 13
Florida Prepaid Postsecondary Educ. Expense Bd. v. *College Sav. Bank*, 527 U.S. 627 (1999) 34
Frost v. *Corporation Comm'n*, 278 U.S. 515 (1929) 37, 38
Fugazy Express, Inc., In re, 114 B.R. 865 (Bankr. S.D.N.Y. 1990) 22
Garcia v. *United States*, 469 U.S. 70 (1984) 13
Hammerschmidt v. *United States*, 484 U.S. 19 (1987) 21
Jackson, Ex parte, 96 U.S. 727 (1877) 42
Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 34
Keney v. *Derbyshire*, 718 F.2d 352 (10th Cir. 1983) 21, 25
Kimura, In re, 969 F.2d 806 (9th Cir. 1992) 21
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 8, 36
Louisiana v. *Morgan*, 28 La. Ann. 482, aff'd, 93 U.S. 217 (1876) 38
Mackey v. *Montrym*, 443 U.S. 1 (1979) 7, 21
Maestri v. *Board of Assessors*, 34 So. 658 (La. 1903) 38
McNally v. *United States*, 483 U.S. 350 (1987) ..... *passim*
Mercoid Corp. v. *Mid-Continent Inv. Co.*, 320 U.S. 661 (1944) 34
New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U.S. 650 (1885) 37
Northwest Airlines, Inc. v. *County of Kent*, 510 U.S. 355 (1994) 19
O'Neill's Shannon Village, In re, 750 F.2d 679 (8th Cir. 1984) 22

Cases—Continued: Page

Rainbo Express, In re, 179 F.2d 1 (7th Cir.), cert. denied, 339 U.S. 981 (1950) 22
Rapier, In re, 143 U.S. 110 (1892) 41
Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 13, 21, 23
Salinas v. *United States*, 522 U.S. 52 (1997) 14-15, 18, 41
Standefer v. *United States*, 447 U.S. 10 (1980) 18
Streep v. *United States*, 160 U.S. 128 (1895) 14
Tennessee Elec. Power Co. v. *TVA*, 306 U.S. 118 (1939) 38
Terwilligers Catering Plus, Inc., In re, 911 F.2d 1168 (6th Cir. 1990), cert. denied, 501 U.S. 1212 (1991) 21, 22
Toulabi v. *United States*, 875 F.2d 122 (7th Cir. 1989) 23, 40
Transparent-Wrap Mach. Corp. v. *Stokes & Smith Co.*, 329 U.S. 637 (1947) 34
21 W. Lancaster Corp. v. *Main Line Restaurant, Inc.*, 790 F.2d 354 (3d Cir. 1986) 21, 22
United States v. *Alkins*, 925 F.2d 541 (2d Cir. 1991) 44
United States v. *Bass*, 404 U.S. 336 (1971) 41
United States v. *Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), cert. denied, 507 U.S. 959 (1993) 4, 36
United States v. *Clausen*, 792 F.2d 102 (8th Cir.), cert. denied, 479 U.S. 858 (1986) 14
United States v. *Cronic*, 900 F.2d 1511 (10th Cir. 1990) 14
United States v. *Ferrara*, 701 F. Supp. 39 (E.D.N.Y.), aff'd without opinion, 868 F.2d 1268 (2d Cir. 1988) 23
United States v. *Frost*, 125 F.3d 346 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998) 33
United States v. *Gonzales*, 520 U.S. 1 (1997) 41
United States v. *Granberry*, 908 F.2d 278 (8th Cir. 1990), cert. denied, 500 U.S. 921 (1991) 22

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United States v. *Halbert*, 640 F.2d 1000 (9th Cir. 1981) 14
United States v. *Italiano*, 894 F.2d 1280 (11th Cir. 1990) 38
United States v. *Kato*, 878 F.2d 267 (9th Cir. 1989) 22-23
United States v. *Martinez*, 905 F.2d 709 (3d Cir.), cert. denied, 498 U.S. 1017 (1990) 4, 12, 14, 19, 20
United States v. *Murphy*, 836 F.2d 248 (6th Cir.), cert. denied, 488 U.S. 924 (1988) 23
United States v. *Novod*, 923 F.2d 970 (2d Cir.), cert. denied, 500 U.S. 919 (1991) 33
United States v. *Salvatore*, 110 F.3d 1131 (5th Cir.), cert. denied, 522 U.S. 981 (1997) 5, 8, 20, 24, 28, 32, 36, 40
United States v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998) 40
Whitson v. *United States*, 122 F.2d 1016 (9th Cir. 1941) 12

Statutes:

Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 10
Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873 ..... 10, 15, 19
Act of Sept. 19, 1890, ch. 908, §§ 1-3, 26 Stat. 465-466 17
Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 ..... 10, 15, 19
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, Subtitle O, § 7603(a), 102 Stat. 4508 ..... 11, 43
11 U.S.C. 541 22
18 U.S.C. 2 42
18 U.S.C. 371 4
18 U.S.C. 1341 ..... *passim*
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Statutes—Continued: Page

18 U.S.C. 1956 (1994 & Supp. II 1996) 4
18 U.S.C. 1962(c) 4
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26 U.S.C. 6321 24-25
26 U.S.C. 7206(2) 4
Louisiana Admin. Code title 42 (2000):
§ 2405(A)(2) 32
§ 2409(A)(1) 32
§ 2409(A)(2) 32
Louisiana Video Draw Poker Devices Control Law, La. Rev. Stat. Ann. (West 1989 & Supp. 2000):
§§ 27:301 *et seq.* 23
§ 27:301(B)(8) 23
§ 27:301(D) 24
§ 27:302(A)(1)-(4) 30
§ 27:302(A)(5)(a)-(g) 30
§ 27:302(A)(5)(h)-(o) 30
§ 27:302(A)(5)(o) 35
§ 27:302(D) 30
§ 27:304 30
§ 27:305(A) 30
§ 27:306 32
§ 27:306(A)(1) 30, 31
§ 27:306(A)(2) 30
§ 27:306(A)(2)-(4) 30
§ 27:306(A)(4)(a) 30
§ 27:306(A)(4)(b) 29
§ 27:306(A)(5)(b) 24
§ 27:306(D)(2) 31
§ 27:306(D)(2)(b) 36
§ 27:306(E) 36
§ 27:308(B) 24, 31, 32, 36
§ 27:308(C) 24, 31, 32, 36
§ 27:308(E)(5) 30
§ 27:310(B) 3, 23, 31
§ 27:310(B)(8) 23

Statutes—Continued: Page

§ 27:310(E) 24
§ 27:311(A) 28, 32, 35
§ 27:311(A)(4)(b) 29
§ 27:311(A)(5)(c) 29
§ 27:311(A)-(D) 23, 32
§ 27:311(B) 29
§ 27:311(D) 29, 35, 39
§ 27:311(G) 23, 31, 32, 35
§ 27:311(H) 23
§ 27:111(H)(2) 23, 28
§ 27:311(H)(4) 28
§ 27:312 29-30
Md. Regs. Code title 14, § 14.01.03.12 (2000) 39
N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 502 (McKinney 2000) 39
Or. Rev. Stat. (1997):
§ 461.213 39
§ 461.215 39
§ 461.543 39
30 Geo. II, Ch. 24 (1757) (Eng.) 12

Miscellaneous:

American Heritage Dictionary (3d ed. 1994) 11
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pp. 33,296-33,297 43
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Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771 (1980) 10, 15, 17, 19
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S. Doc. No. 68, 57th Cong., 1st Sess. Pt. 2 (1901) 16, 17
Alan Sayre, *Video Poker Edges Back in La.*, The Charleston Gazette, Feb. 28, 2000 30
Websters New Collegiate Dictionary (1977) 11
Webster's New International Dictionary (1917) 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 182 F.3d 296. The opinion of the district court (Pet. App. 52a-86a) is reported at 951 F. Supp. 1249.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1999. The petition for rehearing was denied on September 2, 1999 (Pet. App. 45a-47a). The petition for a writ of certiorari was filed on November 9, 1999, and was granted on March 20, 2000, limited to the first

question presented. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 1341 of Title 18 of the United States Code is set forth in Appendix A to this brief.

STATEMENT

This case arises out of a scheme to obtain a lucrative video poker license from the State of Louisiana by submitting false information to the State about the prospective licensee's true owners. Petitioner challenges the court of appeals' holding that such a scheme violates the federal mail fraud statute, 18 U.S.C. 1341.

1. In 1992, Fred Goodson and his family formed Truck Stop Gaming, Ltd. (TSG, Ltd.) and its corporate partner, Truck Stop Gaming, Inc. (TSG, Inc.), in order to participate in the video poker business at their truck stop in Slidell, Louisiana. Petitioner Carl Cleveland, a lawyer, assisted the Goodsons in preparing applications for a video poker license for TSG, Ltd., and submitting those applications to the State. The applications required a partnership seeking a gaming license to identify its partners, to submit personal financial statements for all partners, to affirm that the listed partners were the sole beneficial owners of the business, and to affirm that no partner had an arrangement to hold his interest as "an agent, nominee or otherwise," or a present intention to transfer any interest in the partnership at a future time. Pet. App. 2a-3a.

The initial application submitted on behalf of TSG, Ltd., identified Maria and Alex Goodson, Fred Goodson's adult children, as the limited partners and TSG, Inc., as the general partner. The application listed no other persons or entities as having any ownership interest in TSG, Ltd. In 1993, 1994, and 1995, TSG,

Ltd., submitted renewal applications that likewise listed no additional ownership interests. In fact, the true owners of TSG, Ltd., at all times were petitioner and Fred Goodson, both of whom concealed their ownership interests from state regulators to avoid an inquiry into their suitability as owners of a licensee. Pet. App. 5a-6a; see La. Rev. Stat. Ann. § 27:310(B) (West 1989 & Supp. 2000) (enumerating suitability requirements for video poker licensees).[1]

2. In 1996, a federal grand jury in the Eastern District of Louisiana indicted petitioner, Fred and Maria Goodson, and others on multiple counts of mail fraud, racketeering, and various other offenses. The indictment alleged, among other things, that the defendants committed mail fraud, in violation of 18 U.S.C. 1341, by obtaining a video poker license for TSG, Ltd., in 1992 and renewing the license in 1993, 1994, and 1995, by fraudulently concealing that petitioner and Fred Goodson were the true owners of TSG, Ltd. Pet. App. 5a.

Before trial, petitioner moved to dismiss the mail fraud counts of the indictment on the ground that state licenses to operate video poker machines do not constitute "property" within the meaning of Section 1341, which makes it a crime to use the mails in connection with "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. Petitioner claimed that a scheme to acquire a video poker license through false representations does not implicate any property interest of the

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[1] The evidence at trial indicated that petitioner and Fred Goodson had tax and financial problems that could have interfered with or delayed approval of the license if their interests in TSG, Ltd., had been disclosed. See Gov't C.A. Br. 11.

State, arguing that such licenses have no value to the State and, consequently, do not become property until they are issued by the State to a private party.

The district court rejected that contention. Pet. App. 73a-86a. The court concluded that "licenses constitute property even before they are issued," agreeing with the position of the First Circuit and the Third Circuit on that question. *Id.* at 79a; see also *id.* at 75a-77a (citing *United States* v. *Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), cert. denied, 507 U.S. 959 (1993), and *United States* v. *Martinez*, 905 F.2d 709 (3d Cir.), cert. denied, 498 U.S. 1017 (1990)). The court distinguished cases involving other sorts of licenses, such as taxi licenses, pilot's licenses, and arms export licenses, in which a government was held to have only a regulatory interest, and not a property interest. *Id.* at 83a. The court reasoned that the State of Louisiana clearly has a property interest in video poker licenses because the State "receives a significant percentage of revenue" from the licenses and "continues to exercise a great deal of control" over them. *Id.* at 83a.

After a jury trial, petitioner was convicted on two counts of mail fraud. He was also convicted of conducting an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); money laundering, in violation of 18 U.S.C. 1956 (1994 & Supp. II 1996); tax conspiracy, in violation of 18 U.S.C. 371; and filing a false tax return, in violation of 26 U.S.C. 7206(2). He was sentenced to 121 months' imprisonment.

3. The Fifth Circuit affirmed petitioners' conviction and sentences. Pet. App. 1a-44a.

The court of appeals rejected petitioner's contention that a video poker license does not constitute property

for purposes of the mail fraud statute. Pet. App. 19a. The court relied on its earlier decision in *United States* v. *Salvatore*, 110 F.3d 1131 (5th Cir.), cert. denied, 522 U.S. 981 (1997), which held that Louisiana had a property interest in the video poker licenses that it issues.

In *Salvatore*, the court of appeals explained that "property" is defined as "a legal 'bundle of rights'" that one possesses in connection with a particular object. 110 F.3d at 1140. The court reasoned that, because the State has the right to control whether and to whom video poker licenses are issued, the State has a property interest in the licenses. *Ibid.* The court rejected the defendants' argument that a video poker license has no value to the State, and thus cannot constitute property. It explained that "(1) the State expects to collect an up-front fee (before issuance) and a percentage of net revenues (in the future) from the putative licensee and (2) the State values its rights to control the licenses and to choose the parties to whom it issues the licenses." *Id.* at 1141. The court also rejected the defendants' contention that the State's interest in the video poker licenses is a regulatory interest, rather than a property interest, noting the State's "direct and significant financial stake * * * as issuer of the licenses" that continues throughout the term of the licenses. *Id.* at 1142. The court thus concluded that "a video poker license does not merely signify government approval of an individual's right to take part in a particular industry," but "also evinces the State's intent to participate in that industry." *Id.* at 1141.

SUMMARY OF THE ARGUMENT

The federal mail fraud statute, 18 U.S.C. 1341, reaches "any scheme or artifice to defraud, or for ob-

taining money or property by means of false or fraudulent pretenses, representations, or promises" that involves the use of the mails. The court of appeals held in this case that petitioner violated the mail fraud statute by engaging in a scheme to obtain and renew a Louisiana video poker license by making false representations to the State about the ownership of the licensee. Petitioner contends that the scheme does not come within the scope of the mail fraud statute, arguing that the video poker license was not "money or property" in the hands of the State. Petitioner is mistaken for two independent reasons. First, because the government proved that petitioner violated the second clause of the mail fraud statute by engaging in a "scheme * * * for obtaining money or property" by false or fraudulent means, the government did not also have to prove that the scheme sought to deprive the State of money or property. Second, whether or not the government was required under the mail fraud statute to prove that petitioner deprived the State of money or property, the State had a property interest in the video poker license at issue here.

1. The second clause of the mail fraud statute, which proscribes "any scheme * * * for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," does not require that the scheme be one for depriving a victim of money or property. Nothing in the common understanding of the word "obtain" suggests that such a deprivation is required. Although Congress could have narrowed the second clause by including the words "from another" at the end of the phrase "for obtaining money or property," Congress did not do so. The second clause thus encompasses cases in which a defendant, through false or fraudulent means, obtains something that might not

be "money or property" in the hands of the victim, but that becomes "money or property" in the defendant's own hands.

In *McNally* v. *United States*, 483 U.S. 350 (1987), the Court construed the first clause of the mail fraud statute to hold that a "scheme or artifice to defraud" must be aimed at depriving a victim of a right to money or property, as opposed to "intangible rights, such as the right to have public officials perform their duties honestly." *Id.* at 358. The Court rested that conclusion on the contemporaneous understanding of the phase "to defraud" in the first clause. The Court's decision thus did not turn on the "money or property" language of the second clause. Indeed, the Court observed that, "because the two [clauses] identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently." *Ibid.*

The scheme in this case was indisputably one "for obtaining money or property" under the second clause of the mail fraud statute. A video poker license, whether or not property in the hands of the State, is property in the hands of the licensee. Such a license enables the holder to engage in a lucrative business, which would otherwise be illegal, and is protected under state law against arbitrary suspension or revocation. This Court and the lower federal courts have recognized, in a variety of contexts, that a person has a property interest in a government-issued license that enables him to engage in an occupation, a business, or another money-making activity. See, *e.g.*, *Barry* v. *Barchi*, 443 U.S. 55, 64 (1979); *Mackey* v. *Montrym*, 443 U.S. 1, 10 (1979); *Bell* v. *Burson*, 402 U.S. 535, 542 (1971).

2. In any event, the State of Louisiana has a property interest in the video poker licenses that it

issues. A video poker license is plainly "something of value," *McNally*, 483 U.S. at 358, to the State. The State receives a substantial up-front payment for each video poker license, an annual licensee fee throughout the term of each license, and a percentage of the net proceeds from each licensed video poker device. In addition, the State retains a significant degree of control over each license, including over its renewal, transfer, and revocation. As the court of appeals recognized in an earlier case on this issue, "[o]ne of the main reasons for the * * * legalization of video poker [in Louisiana] was that it was considered an ongoing source of revenue for the State." *United States* v. *Salvatore*, 110 F.3d 1131, 1141 (5th Cir.), cert. denied, 522 U.S. 981 (1997). Indeed, since instituting licensed video poker in 1991, the State has reaped hundreds of millions of dollars in fees and payments from licensees.

Moreover, whether or not the State has a property interest in an unissued video poker license, this case involves a scheme not only to obtain a license, but also to renew that license, after its issuance, for three subsequent periods. The State has a property interest in a video poker license after it has been issued—and thus has become property in the hands of the licensee —because the State retains the right to payments from the licensee and the right to monitor and control the licensed activity. The State retains authority over renewal, suspension, or revocation of a license, and the State prohibits the transfer of a license to another person. One of the rights that is often associated with the ownership or possession of property is the right to control its alienation. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

Finally, petitioner contends that the State has merely a regulatory interest, not a property interest in

a video poker license, relying primarily on cases involving other sorts of government licenses, such as driver's licenses, medical licenses, and arms export licenses. But the Court need not decide in this case whether a State has a property interest in all of the varieties of licenses that it issues. The Court need conclude only that the State has a property interest in the particular variety of license at issue here—a license under which the State retains a substantial economic stake in the licensed activity.

ARGUMENT

PETITIONER'S SCHEME TO OBTAIN A VIDEO POKER LICENSE BY PROVIDING FALSE INFORMATION TO THE STATE THROUGH THE MAILS VIOLATED THE MAIL FRAUD STATUTE

The mail fraud statute prohibits (1) "any scheme or artifice to defraud" and (2) "any scheme or artifice * * * for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." A scheme to acquire a Louisiana video poker license by false representations violates the second clause of the statute, whether or not the license constitutes "property" in the hands of the State. The object of the scheme is to "obtain[]" the license, and the license indisputably constitutes "property" in the hands of the licensee. The scheme also violates the first clause of the statute. While the words "to defraud" refer to "wronging one in his property rights by dishonest methods or schemes," *McNally* v. *United States*, 483 U.S. 350, 358 (1987), the State's financial stake in and control over video poker licenses qualify as a property right protected by the mail fraud statute.

I. A SCHEME TO OBTAIN PROPERTY THROUGH FRAUDULENT MEANS VIOLATES THE MAIL FRAUD STATUTE, WHETHER OR NOT THE SCHEME WAS ONE TO DEPRIVE A VICTIM OF PROPERTY

A. The Second Clause Of 18 U.S.C. 1341 Does Not Require That A Victim Be Deprived Of Money Or Property, So Long As The Defendant Obtained Money Or Property

1. Congress enacted three prohibitions in the mail fraud statute, 18 U.S.C. 1341, and each clause of the statute proscribes a distinct sort of "scheme or artifice." The first clause, which prohibits "any scheme or artifice to defraud," derives from the original mail fraud statute enacted in 1872. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. The second clause, which prohibits schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," was added in 1909. Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. The third clause, which prohibits schemes to use the mails to distribute counterfeit money, was enacted in 1889. Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873. See Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 779-821 (1980) (Rakoff).

In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court was concerned with the first clause of Section 1341. *McNally* held that a "scheme or artifice to defraud," within the meaning of the statute, must be aimed at depriving a victim of a right to money or property, as opposed to "intangible rights, such as the right to have public officials perform their duties honestly." *Id.* at 358. The Court rested that conclusion on the common understanding of the term "to defraud"

at the time that the original mail fraud statute was enacted. *Id.* at 358-359.[2]

McNally did not construe the second clause of Section 1341, which prohibits schemes "for obtaining money or property" by false or fraudulent means. The second clause does not contain the words "to defraud" or any other textual limitation requiring the *deprivation* of a victim's money or property. Nothing in the common understanding of the word "obtain," either today or when the second clause was enacted in 1909, suggests that such a deprivation is required. See, *e.g.*, *Webster's New International Dictionary* 1485 (1917) (defining "obtain" as "[t]o get hold of by effort; to gain possession of; to procure; to acquire, in any way") (first definition).[3]

Although Congress could easily have narrowed the second clause of Section 1341 by including the words

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[2] In response to *McNally*, Congress enacted 18 U.S.C. 1346, which provides that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4508. As modified by Section 1346, the first clause of Section 1341 now encompasses certain schemes to deprive a victim of something other than money or property.

[3] See also, *e.g.*, *American Heritage Dictionary* 575 (3d ed. 1994) ("[t]o succeed in gaining possession of; acquire"); *Random House Dictionary of the English Language* 1338 (2d. ed. 1987) ("[t]o come into possession of; get, acquire, or procure, as through an effort or by a request"); *Black's Law Dictionary* 972 (5th ed. 1979) ("[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way"); *Webster's New Collegiate Dictionary* 793 (1977) ("[t]o gain or attain usu. by planned action or effort"); VII James A.H. Murray, *New English Dictionary* 37 (1909) ("[t]o come into the possession or enjoyment of (something) by one's own effort, or by request; to procure or gain, as the result of purpose and effort; hence, generally, to acquire, get").

"from another" at the end of the phrase "for obtaining money or property," Congress did not do so. Congress thereby departed from the otherwise similar wording of the original English false pretenses statute, which made it a crime "by false pretence or pretences, [to] obtain *from any person* * * * money, goods, wares, or merchandizes, with intent to cheat or defraud any person." 30 Geo. II, ch. 24 (1757) (emphasis added). Congress, like the English Parliament, knew how to restrict such crimes to those in which money or property was obtained from a victim.

The second clause of Section 1341 thus encompasses those cases in which the defendant, through false or fraudulent pretenses, representations, or promises, obtains something that might not be "money or property" in the hands of the victim, but that beomes "money or property" in the defendant's own hands. As the Third Circuit has put it, the second clause "is broad enough to cover a scheme to defraud a victim of something that takes on value only in the hands of the acquirer." *United States* v. *Martinez*, 905 F.2d 709, 713, cert. denied, 498 U.S. 1017 (1990); cf. *Whitson* v. *United States*, 122 F.2d 1016, 1017 (9th Cir. 1941) (mail fraud statute reached scheme to persuade charitable organizations to enter into contract under which defendant would be their exclusive fund-raiser; court explained that under the statute "the scheme need not be one to secure moneys from others, but may be 'to defraud, or for obtaining money *or property* by means of false or fraudulent pretenses'").

McNally did not address the argument (see U.S. Br. at 17-22 in *McNally*, *supra* (No. 86-234)), that the second clause of the mail fraud statutes applies to any scheme to "obtain" money or property, even when the scheme does not seek to deprive a victim of money or

property. Rather, the Court declined to address the applicability of the second clause because the jury instructions did not require a finding that the defendants obtained property by fraudulent means. See *McNally*, 483 U.S. at 361.[4] *McNally* thus leaves open the proper construction of the second clause of Section 1341. In accordance with its plain language, that clause encompasses any scheme "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," whether or not the scheme is one for depriving a victim of money or property.

2. The conclusion that the second clause of Section 1341, unlike the first clause at the time of *McNally* (see note 2, *supra*), is not limited to schemes to deprive a victim of money or property finds support in the structure of the statute. The two clauses were, as noted above, enacted at different times. The clauses are separated, moreover, by the disjunctive "or." This Court has stated, reflecting common English usage, that "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); accord *Garcia* v. *United States*, 469 U.S. 70, 73 (1984); *FCC* v. *Pacifica Found.*, 438 U.S. 726, 739-740 (1978). Accordingly, this Court, construing an earlier version of the mail fraud statute, concluded that an indictment that charged a scheme to sell counterfeit money, a violation of what is now the third clause, did not have to include a charge that the defendant devised a scheme "to defraud," a violation of the first clause, because the statutory prohibitions were listed sepa-

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[4] The jury charge in this case did not suffer from that deficiency. See pp. 25-27, *infra*.

rately and applied to different conduct. *Streep* v. *United States*, 160 U.S. 128, 132-133 (1895).

In *McNally*, this Court acknowledged that the first and second clauses of Section 1341 may likewise have separate meanings. The Court observed that "[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently." *McNally*, 483 U.S. at 358. Thus, the Court did not rest its holding in *McNally* that the first clause of Section 1341 requires a deprivation of money or property, as opposed to "intangible rights," on the "money or property" language of the second clause. Rather, the Court derived that requirement from the common understanding of the words "to defraud" in the first clause. See *id.* at 358.

The lower federal courts have recognized, both before and after *McNally*, that the first and second clauses of Section 1341 have independent significance. See, *e.g.*, *United States* v. *Martinez*, 905 F.2d at 713 (second clause of Section 1341, but not first clause, reaches schemes that do not involve a deprivation of a victim's money or property); *United States* v. *Cronic*, 900 F.2d 1511, 1513-1514 (10th Cir. 1990) (first clause of Section 1341, but not second clause, reaches schemes to defraud that do not involve false pretenses, representations, or promises); *United States* v *Clausen*, 792 F.2d 102, 104-105 (8th Cir.) (same), cert. denied, 479 U.S. 858 (1986); *United States* v. *Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981) (same).

3. The background of the mail fraud statute does not require a narrower reading than its language suggests. It is well settled that "[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure" from the "plain and unambiguous meaning of the statutory language." *Salinas* v.

United States, 522 U.S. 52, 57 (1997) (internal quotation marks omitted). Nothing in the scant legislative history of the second clause of Section 1341 suggests, let alone clearly expresses, any intention that the clause be construed other than in accordance with its plain language, which encompasses "*any* scheme or artifice * * * for obtaining money or property" by the specified fraudulent means, without limitation to those schemes involving a deprivation of a victim's money or property.

In 1909, Congress enacted a comprehensive revision of the federal criminal laws that included a number of changes in the mail fraud statute. One of those changes was the insertion in the statute, after the phrase "[w]hoever, having devised or intending to devise any scheme or artifice to defraud," of the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[5]

The mail fraud amendments were enacted by the 61st Congress without any committee report or floor debate. See Rakoff, 18 Duq. L. Rev. at 816 n.205 (noting that "there is virtually no direct legislative history" of the 1909 amendments); see also *McNally*, 483 U.S. at 357-358 & n.7. The only explanations of the mail fraud

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[5] The 1909 amendments included other significant changes in the mail fraud statute. Those changes included the elimination of language characterizing the offense conduct as "misusing the post-office establishment," the elimination of the penalty provision by which courts were required to "proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme or device," and, most notably, the elimination of the requirement that the defendant intended the fraudulent scheme to be effected through use of the mails. Compare 25 Stat. 873 with 35 Stat. 1130; see Rakoff, 18 Duq. L. Rev. at 816.

amendments, which reflect the earlier views of their sponsor and of the commission that originally proposed them, do not specifically address the provision at issue here.

In explaining the mail fraud amendments during the 60th Congress, Senator Heyburn, the sponsor, dealt only with a change in the statute that involved mailings made from outside the United States, noting that the other changes were self-explanatory. See 42 Cong. Rec. 1026 (1908) (remarks of Sen. Heyburn) ("I do not think there is any other change, which is not obvious upon the face of the bill, that needs any further explanation.") (cited in *McNally*, 483 U.S. at 358 n.7). Senator Heyburn's remark suggests that the second clause should be read in accordance with common usage, for otherwise its meaning would not be self-explanatory.

The only other legislative history of the 1909 amendments is the Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States, which in 1901 proposed to the Attorney General and Congress a number of changes in the federal criminal statutes, including the addition of the language that became the second clause of the mail fraud statute. See S. Doc. No. 68, 57th Cong., 1st Sess. Pt. 2 (1901) (S. Doc. 68) (cited in *McNally*, 483 U.S. at 357-358 n.7). In the portion of the Report describing the proposed changes in the mail fraud statute, the Commission did not mention the language that became the second clause. See *id.* at xvii.[6] In the portion of the Report

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[6] The Commission appeared to allude to that provision, however, in the portion of the Report discussing the lottery statute. The Commission stated that certain words added to the lottery statute in 1890 that prohibited mailings "concerning schemes devised for the purpose of obtaining money or property under false pretenses" were being omitted "as they have respect to an offense

setting forth the text of the revised mail fraud statute, the Commission cited, in the margin, five decisions of this Court, 29 decisions of the lower federal courts, and two Attorney General opinions that had construed the existing mail fraud statute. See *id.* at 63. The Commission did not, however, explain the significance, if any, of those citations.[7]

The Court stated in *McNally* that the addition of the second clause in 1909 codified the holding in *Durland* v. *United States*, 161 U.S. 306, 313 (1896), that the mail fraud statute encompasses not only false statements of existing fact, but also false promises with respect to the future. See *McNally*, 483 U.S. at 357. The Court also stated that the language of the second clause "is based on the statement in *Durland* that the statute reaches 'everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.'" *McNally*, 483 U.S. at 358 (quoting *Durland*, 161 U.S. at 313). In fact, however, the language of the second clause is virtually identical to language added to the federal lottery statute six years before *Durland*.[8] And the legislative history of the 1909

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which is fully covered by another section, and are not essentially germane here." S. Doc. 68, at xvii.

[7] The Commission may simply have been identifying all of the reported mail fraud decisions. Some of those decisions took inconsistent positions with respect to the reach of the statute, which suggests that their mere citation does not indicate an intent to codify them. See Rakoff, 18 Duq. L. Rev. at 795-816 (contrasting the lower courts' "broad construc[illegible]ist" and "strict constructionist" approaches to the pre-1909 mail fraud statute).

[8] See Act of Sept. 19, 1890, ch. 908, §§ 1-3, 26 Stat. 465-466 (prohibiting the use of the mails in connection with, *inter alia*, "schemes devised for the purpose of obtaining money or property under false pretenses"; authorizing the Postmaster General to

amendments does not reveal an intent to codify *Durland*. No member of Congress, the Executive Branch, or the Commission to Revise and Codify the Criminal and Penal Laws described the second clause as a codification of *Durland*. The only reference to *Durland* in the legislative history is in the string citation of 36 mail fraud decisions and Attorney General opinions in the Commission's Report. If Congress had intended merely to codify the holding in *Durland*, its most natural course would have been to amend the first clause by inserting the words "whether by false pretenses, representations or promises" after the phrase "scheme or artifice to defraud." But Congress did not choose that approach. Instead, Congress added a new clause employing the disjunctive "or"—a strong indication that it intended to create an independent way of violating the statute.

The absence of any legislative history of the 1909 amendments addressing whether the second clause, like the first clause, contains a requirement that a victim be deprived of money or property—a requirement that is not evident on the face of the second clause—cannot constitute the requisite "extraordinary showing" of congressional intent needed to depart from the plain meaning of the statutory text. See *Salinas*, 522 U.S. at 57; see also *Standefer* v. *United States*, 447 U.S. 10, 20 n.12 (1980) ("an omission in the legislative history

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direct the return of registered mail involved in, *inter alia*, "any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises"; authorizing the Postmaster General to forbid the payment of postal money orders in connection with, *inter alia*, "any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises").

[cannot] nullify the plain meaning of a statute"). Indeed, the 1909 amendments included other significant changes in the mail fraud statute that likewise went unremarked upon by Congress, including the elimination of the requirement that the defendant intended the fraudulent scheme to be effected through use of the mails. Compare 25 Stat. 873 with 35 Stat. 1130; see Rakoff, 18 Duq. L. Rev. at 816.

* * *

In sum, while the second clause of Section 1341 includes schemes to deprive a victim of his money or property, the second clause is not limited to such schemes. The plain language of the second clause authorizes convictions where the defendant acted to "obtain[] money or property by means of false or fraudulent premises, representations, or promises," whether or not he also acted to deprive a victim of money or property.[9]

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[9] Although the first question presented by the petition focuses on whether "a license that has not yet been issued constitutes 'property' of the State," Pet. i, the Court has the authority to affirm the court of appeals' judgment on the alternative ground that the second clause of Section 1341 requires a scheme "for obtaining money or property" for the defendant (or another person), and does not require a scheme for depriving a victim of money or property. See *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977) ("respondents * * * are entitled under our precedents to urge any grounds which would lend support to the judgment below"); see also *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994) (respondent may "defend a judgment on any ground properly raised below"). Although the government did not expressly raise that argument in the district court, the government did direct the district court's attention to the Third Circuit's decision in *United States* v. *Martinez*, 905 F.2d at 712-714, which held, *inter alia*, that the second clause of Section 1341 "is broad enough to cover a scheme to defraud a victim of something

B. The Scheme In This Case Violated The Second Clause Of Section 1341 Because Petitioner Sought To "Obtain[] Property" In The Form Of A State Video Poker License

As explained above, in order to establish a violation of the second clause of Section 1341, the government must prove, *inter alia*, that the defendant's fraudulent scheme was one "for obtaining money or property." Here, the government charged petitioner with engaging in a scheme to obtain a video poker license for TSG, Ltd., a partnership in which petitioner had an undisclosed interest. A state video poker license, which has significant economic value to a licensee and which is protected against arbitrary suspension or revocation under state law, clearly constitutes property to the licensee.

1. Section 1341 does not define the term "property." Nor has the Court articulated any comprehensive definition of that term for purposes of Section 1341. The Court has recognized in other contexts, however, that the term "property" has "a naturally broad and inclusive meaning" that, according to its dictionary definition and "common usage," comprehends "anything

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that takes on value only in the hands of the acquirer," *id.* at 713. See Pet. App. 77a (noting the government's reliance on *Martinez*). The district court quoted that language from *Martinez* with approval. *Id.* at 78a. And, on appeal, the government had no need to rely on the second clause because the Fifth Circuit had already held that Section 1341 reaches schemes to obtain a video poker licenses from the State of Louisiana before the present case was briefed and argued. See *United States* v. *Salvatore*, 110 F.3d 1131, cert. denied, 522 U.S. 981 (1997). In these circumstances, and particularly given that the question is essentially one of pure statutory construction, the Court may affirm the conviction based on the second clause of Section 1314.

of material value owned or possessed." *Reiter* v. *Sonotone Corp.*, 442 U.S. at 338. No reason exists to construe the term "property" in Section 1341 any more restrictively. See *McNally*, 483 U.S. at 358 (equating "property rights" with "something of value") (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)); see also *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) (holding that the first clause of Section 1341 applies to schemes to defraud a victim of both tangible and intangible property rights).

This Court and other courts have recognized, in a variety of contexts, that a license that permits a person to engage in an occupation, a business, or another money-making activity may constitute a form of property. For example, the Court held that an individual had a "property interest" in his state horse trainer's license that was "sufficient to invoke the protection of the Due Process Clause." *Barry* v. *Barchi*, 443 U.S. 55, 64 (1979); see also, *e.g.*, *Mackey* v. *Montrym*, 443 U.S. 1, 10 (1979) (driver's license); *Bell* v. *Burson*, 402 U.S. 535, 542 (1971) (same); *Beauchamp* v. *De Abadia*, 779 F.2d 773, 775 (1st Cir. 1985) (license to practice medicine); *Keney* v. *Derbyshire*, 718 F.2d 352, 354 (10th Cir. 1983) (same). Those decisions rest, in part, on the recognition that "[o]nce licenses are issued, * * * their continued possession may become essential in the pursuit of a livelihood." *Bell*, 402 U.S. at 539.

In addition, the courts have held that licenses to engage in a business or profession have sufficient indicia of property so as to be subject to a federal tax lien,[10]

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[10] See, *e.g.*, *In re Kimura*, 969 F.2d 806, 811 (9th Cir. 1992); *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1170-1172 (6th Cir. 1990), cert. denied, 501 U.S. 1212 (1991); *21 W. Lancaster*

that they qualify as property to which a security interest may be attached under the Uniform Commercial Code,[11] and that they constitute property of a bankrupt's estate under the Bankruptcy Code, 11 U.S.C. 541.[12] The dispositive factor in those cases was whether the license "has pecuniary value to its holder." *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1171 (6th Cir. 1990), cert. denied, 501 U.S. 1212 (1991); accord *21 W. Lancaster Corp.* v. *Main Line Restaurant, Inc.*, 790 F.2d 354 (3d Cir. 1986). While courts have also considered whether the license was transferrable for value, see, *e.g.*, *Terwilliger's Catering Plus*, 911 F.2d at 1172, the inability to transfer a particular right does not deprive it of the character of property. See *Drye* v. *United States*, 120 S. Ct. 474, 482-483 n.7 (1999) ("In recognizing that state-law rights that have pecuniary value and are transferable fall within [the federal tax lien statute], we do not mean to suggest that transferability is essential to the existence of 'property' or 'rights to property' under that section."). Even those courts that have held that an unissued license does not constitute property for purposes of the mail fraud statute acknowledge that a license may well be property in the hands of the licensee.[13]

Corp. v. *Main Line Restaurant, Inc.*, 790 F.2d 354, 356-358 (3d Cir. 1986).

[11] See, *e.g.*, *In re O'Neill's Shannon Village*, 750 F.2d 679, 682-683 (8th Cir. 1984); *Bogus* v. *American Nat'l Bank of Cheyenne*, 401 F.2d 458, 461 (10th Cir. 1968).

[12] See, *e.g.*, *Terwilliger's Catering Plus*, 911 F.2d at 1172; *In re Rainbo Express*, 179 F.2d 1, 5 (7th Cir.), cert. denied, 339 U.S. 981 (1950); *In re Fugazy Express, Inc.*, 114 B.R. 865, 869-871 (Bankr. S.D.N.Y. 1990).

[13] See, *e.g.*, *United States* v. *Granberry*, 908 F.2d 278, 280 (8th Cir. 1990), cert. denied, 500 U.S. 921 (1991); *United States* v. *Kato*,

2. A Louisiana video poker license, once obtained by the licensee, fits comfortably within the common definition of property. It is clearly something "of material value owned or possessed" by the licensee. *Reiter* v. *Sonotone, Inc.*, 442 U.S. at 338.

A license issued pursuant to the Louisiana Video Draw Poker Devices Control Law, La. Rev. Stat. Ann. § 27:301 *et seq.* (West 1989 & Supp. 2000),[14] permits the licensee to engage in the video poker business at its truck stop, restaurant, hotel, or other authorized establishment. See *id.* § 27:301(B)(8)). The licensee may thereby enhance substantially its financial return from the establishment. Indeed, because the operation of a licensed video poker establishment is so lucrative, licensees are willing to incur the thousands of dollars in application fees and annual license fees that the State imposes upon them. See *id.* § 27:311(A)-(D) and (H).[15] Although a licensee cannot transfer a video poker license, see *id.* § 27:311(G), a licensee that owns or op-

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878 F.2d 267, 269 (9th Cir. 1989); *Toulabi* v. *United States*, 875 F.2d 122, 125 (7th Cir. 1989); *United States* v. *Murphy*, 836 F.2d 248, 253-254 (6th Cir.), cert. denied, 488 U.S. 924 (1988); *United States* v. *Ferrara*, 701 F. Supp. 39, 42 (E.D.N.Y.), aff'd without opinion, 868 F.2d 1268 (2d Cir. 1988). Petitioner likewise acknowledges (Br. 10) that "a license may constitute property to the *licensee*."

[14] Since the events at issue, the Louisiana Video Draw Poker Devices Control Law has been recodified. All citations are to the current codification (West 1989 & Supp. 2000).

[15] For example, a new applicant for a video poker license for a truck stop must pay a $10,000 "processing fee" to the State. See La. Rev. Stat. Ann. § 27:311(H)(2). Once the license is obtained, the licensee must pay an annual license fee to the state and, if the licensee is also the owner of the video poker devices, a quarterly "franchise payment" based on a percentage of the net proceeds from the devices. See *id.* § 27:311(A)-(D).

erates a truck stop, as in this case, may lease or sublease any restaurant, convenience store, or other business on the premises, see *id.* § 27:306(A)(5)(b)). The location of licensed video poker devices at the truck stop may increase the value of such leases or subleases. Although the Video Gaming Division of the Louisiana State Police may revoke or suspend a video poker license on enumerated grounds, see *id.* § 27:308(B) and (C), the licensee has the right to challenge the revocation or suspension in a hearing before the Video Gaming Division and to judicial review by a state court, see *id.* § 27:310(E).

In short, a video poker license, as created under Louisiana law, has economic value for its holder and is protected against arbitrary suspension or revocation. It therefore qualifies as property under the federal mail fraud statute. See *United States* v. *Salvatore*, 110 F.3d 1131, 1141 (5th Cir.) (observing that "[i]n the hands of the licensee, the [video poker] license is 'something of value,' for it allows the licensee to operate the video poker machines and collect significant revenue from their use"), cert. denied, 522 U.S. 981 (1997).

No contrary conclusion is required by the provision of the Louisiana Video Draw Poker Devices Control Law that states that a video poker license "is not property or a protected interest under the constitutions of either the United States or the state of Louisiana." La. Rev. Stat. Ann. § 27:301(D). The question whether rights arising under state law constitute "money or property" within the meaning of Section 1341 is ultimately one of federal law. This Court recently considered the similar question of whether a taxpayer's right to a decedent's estate, which was not property under state law, nonetheless was "property" or an "interest in property" under the federal tax lien statute, 26

U.S.C. 6321. *Drye* v. *United States*, 120 S. Ct. at 481-483. The Court concluded that "[t]he question whether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law." *Id.* at 481. The Court explained that "[w]e look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation." *Ibid.*; accord, *e.g.*, *In re Kimura*, 969 F.2d 806, 810 (9th Cir. 1992) (a State cannot "defeat the federal tax lien by declaring an interest not to be property, even though the beneficial incidents of property belie its classification").

That is precisely the analysis that applies here. As explained above, a video poker license, as created under Louisiana law, has substantial economic value to the licensee. In addition, the licensee enjoys a degree of protection under Louisiana law against the arbitrary suspension or revocation of the license. The license therefore qualifies as property under the federal mail fraud statute.

C. The Indictment Charged And The Jury Necessarily Found That Petitioner Engaged In A Scheme To Obtain Property In Violation Of The Second Clause Of Section 1341

The mail fraud counts in the indictment in this case charged petitioner under both the first and second clauses of Section 1341—that is, with having "willfully devised and intended to devise a scheme and artifice to defraud, *and* to obtain property by means of false and fraudulent pretenses and representations." Supersed-

ing Indictment 26 (emphasis added).[16] The indictment then proceeded to describe the alleged scheme as one "to defraud the State of Louisiana and its citizens by fraudulently *obtaining* and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites for Truck Stop Gaming, Ltd." *Ibid.* (emphasis added).

The district court's jury instructions referred the jury to the indictment's description of the alleged scheme. Jury Instructions 27 (directing the jury to pages 26-28 of the indictment). The court had already advised the jury that a copy of the indictment would be available during its deliberations. *Id.* at 16. The court paraphrased the indictment by stating that the defendants were charged with having "knowingly devised a scheme to defraud the State of Louisiana and its citizens by fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites for Truck Stop Gaming, Ltd." *Id.* at 27 (capitalization omitted). The court then instructed the jury that, in order to find the defendants guilty of mail fraud, the jury must find, among other things, that the defendants engaged in the scheme "as charged," *i.e.*, in the scheme to obtain and renew video poker licenses fraudulently. *Ibid.*

The district court went on to conflate the separate requirements of the two clauses by instructing the jury that a "'scheme to defraud' includes any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." Jury Instructions 28. But that instruction does not alter the fact that the jury was required to find all the

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[16] The relevant paragraphs of the indictment and jury instructions are set forth in appendices to this brief.

elements of a violation of the second clause—that is, that petitioner engaged in a fraudulent scheme *to obtain property* in the form of the license.

Thus, given the district court's instructions, the jury necessarily found that the petitioner engaged in a mail fraud scheme in violation of the second clause of Section 1341. On the facts of this case, the jury could not have convicted petitioner of scheming to deprive the State of the license in violation of the first clause without concluding that he schemed to obtain the license in violation of the second clause. The government's proof established that petitioner deprived the State of the license by obtaining it for an entity in which he had an undisclosed ownership interest.

II. PETITIONER VIOLATED THE MAIL FRAUD STATUTE BY ENGAGING IN A SCHEME TO DEPRIVE THE STATE OF AN INTEREST IN PROPERTY

Even if, contrary to our argument in Part I above, the government were required to prove that petitioner engaged in a scheme to deprive the State of Louisiana of money or property, that requirement was satisfied in this case. The State of Louisiana has a property interest in the video poker licenses that it issues. The licenses indisputably constitute "something of value," *McNally*, 483 U.S. at 358, to the State. The State receives a substantial sum of money in exchange for a video poker license, continues to receive payments from the licensee for so long as the license remains in effect, and retains a significant degree of control over the license, including over the renewal, transfer, or revocation of the license. Accordingly, whether or not a government has a property interest in the other sorts of licenses that it issues (*e.g.*, driver's licenses, medical

licenses, export licenses), Louisiana does have a property interest in the particular license at issue here.

We will begin with a discussion of the relevant provisions of the Louisiana Video Draw Poker Device Control Law. We will then explain why those provisions are sufficient to create a property interest on the part of the State in both unissued and issued video poker licenses.

A. The Louisiana Video Draw Poker Device Control Law Vests The State With A Financial Stake In Video Poker Licenses And With Control Over How The Licenses Are Used

Until the enactment of the Louisiana Video Draw Poker Device Control Law in 1991, video poker was illegal in Louisiana, as it remains in many States today. As the Fifth Circuit observed, "[o]ne of the main reasons for the * * * legalization of video poker [in Louisiana] was that it was considered an ongoing source of revenue for the State." *Salvatore*, 110 F.3d at 1141; accord Pet. App. 82a.

The State profits from the licensing of video poker in several ways. First, an applicant for a video poker license must pay a sizable initial "processing fee," which is $10,000 in the case of a truck stop owner; to renew a license, the State charges an additional "processing fee," which is $1,000 in the case of a truck stop owner. La. Rev. Stat. Ann. § 27:311(H)(2) and (4). In addition, the State charges each holder of a video poker license an annual fee, the amount of which depends upon the type of license held; for example, the holder of a manufacturer's license is assessed an annual fee of $20,000, the holder of a device owner's license is assessed an annual fee of $2,000, and the holder of an establishment license is assessed an annual fee of $100. *Id.* § 27:311(A).

The State also assesses an annual video poker device operation fee, imposed on the owner of the device, which amounts to $1,000 per device in the case of truck stops. *Id.* § 27:311(A)(5)(c) and (B). A truck stop may have as many as 50 video poker devices, depending on the amount of fuel sold at the truck stop. *Id.* § 27:306(A)(4)(b). In 1995, the year in which petitioner and his co-defendants submitted the final license renewal application for TSG, Ltd., the State received a total of $10.8 million from those various fees. See Louisiana Legislative Fiscal Office, *State Gaming Revenue—Sources and Uses* 1 (Dec. 20, 1999) (*State Gaming Revenue*).

The State's chief source of revenue from video poker, however, is the quarterly "franchise payment," which consists of a percentage of the net revenue from each licensed video poker device operated in the State. La. Rev. Stat. Ann. § 27:311(D). During the period at issue in this case (1992-1995), the State received between 22.5% and 27.8% of the net revenue from each video poker device. *State Gaming Revenue* 1. Under current law, the State receives as much as 32.5% of the net revenue from video poker devices at truck stops and as much as 26% of the net revenue from video poker devices at restaurants, hotels, bars, and other such establishments. La. Rev. Stat. Ann. § 27:311(D). In 1995, the State received a total of $141.5 million in such franchise payments; by 1999, the State's annual receipts from franchise payments had grown to $188.6 million. *State Gaming Revenue* 1. While some of the State's video poker revenue is allocated to gaming enforcement and related activity, the vast majority goes to the State General Fund ($109.6 million in 1995; $142.1 million in 1999) and to local government ($30.3 million in 1995; $43.4 million in 1999). *Ibid.*; see La. Rev. Stat. Ann. §

27:312 (specifying division of funds received by the State from video poker).[17]

The State, through the Video Gaming Division of the Louisiana State Police, exercises significant control over virtually every aspect of the video poker industry. The State regulates, for example, how the game of video poker is played (La. Rev. Stat. Ann. § 27:302(A)(5)(a)-(g)); the amount of money that may be played and the value of prizes (*id.* § 27:304); the expected payback (*id.* § 27:305(A)); the specifications of video poker devices (*id.* § 27:302(A)(1)-(4) and (5)(h)-(o)); the sorts of establishments that may be licensed for video poker (*id.* § 27:306(A)(2)-(4)); the physical placement and number of devices permitted within a licensed establishment (*id.* §§ 27:302(D), 27:306(A)(2) and (4)(a)); and physical security at licensed establishments (*id.* § 27:308(E)(5)).

The licensing requirements that the State has imposed on those who seek to participate in the video poker industry in Louisiana are specifically designed to protect the economic viability of the industry. The section of the Louisiana Video Draw Poker Device Control Law dealing with license qualifications recognizes "the importance of a controlled gaming industry to the development of the economy of the state of Louisiana." La. Rev. Stat. Ann. § 27:306(A)(1). It further recog-

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[17] On July 1, 1999, video poker was discontinued in 33 of Louisiana's 64 parishes, in accordance with the results of local referenda conducted in 1996. See *Gambling: The Trouble Is, It Makes Money*, The Economist, July 31, 1999. Immediately before the shutdown, there were 15,914 video poker devices operating in Louisiana, 11,040 of which remained operating the next day. As of January 30, 2000, the number of operating video poker devices in Louisiana had risen to 11,792. Alan Sayre, *Video Poker Edges Back In La.*, The Charleston Gazette, Feb. 28, 2000.

nizes that "the success and growth of gaming are dependent upon public confidence and trust that * * * video draw poker gaming activities are conducted honestly and are free from criminal and corruptive elements." *Ibid.* Accordingly, the central requirement of the video poker licensing scheme is that applicants demonstrate their "suitability"—that is, that the applicant is a person of "good character, honesty, and integrity"; that the applicant's "prior activities, arrest or criminal record if any, reputation, habits, and associations do not pose a threat to the public interest of [Louisiana] or to the effective regulation of video draw poker"; that the applicant is likely to conduct the video gaming business "in complete compliance" with state law; and that the applicant is not delinquent in tax or other financial obligations to the State or a local government. *Id.* § 27:310(B).

The State retains a significant degree of control over video poker licenses after they have been issued. The State may revoke or suspend the license of any person who violates a provision of the Louisiana Video Draw Poker Device Control Law or the regulations promulgated by the Video Gaming Division. La. Rev. Stat. Ann. § 27:308(B). The State also may revoke or suspend the license of any person who "did not meet, at the time of application, or does not continue to meet the suitability or other requirements" for a license. *Id.* § 27:308(C). The State prohibits the transfer of a video gaming license to another person except in limited circumstances with the approval of the State. *Id.* § 27:311(G); cf. *id.* § 27:306(D)(2) (permitting transfer of license from one truck stop to another in limited circumstances).

B. The State Has A Property Interest In Video Poker Licenses

A video poker license has economic value to the State. As explained above, a video poker license represents the State's right, under the Louisiana Video Draw Poker Device Control Law, to a stream of payments from the licensee. Those payments consist of the initial fees payable at the time of the application for the license, the annual license fees, and, where the licensee is the owner of video poker devices, quarterly franchise payments based on a percentage of the net proceeds from each device. See La. Rev. Stat. Ann. § 27:311(A)-(D). The State controls who receives a video poker license, whether the license may be renewed, whether the license may be transferred, and, if a violation of state law is suspected, whether the license is suspended or revoked. See *id.* §§ 27:306, 27:308(B) and (C), 27:311(G)

1. The State has a property interest in a video poker license even before the license has been issued because, as the court of appeals put it, "the State expects to collect an up-front fee (before issuance) and a percentage of net revenues (in the future) from the putative licensee." *Salvatore*, 110 F.3d at 1141. Indeed, the State receives the first installment of revenue—the application fee and the initial annual license fee—at the time that the application for the license is filed.[18] The license continues to generate revenue for the State

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[18] See La. Admin. Code title 42, § 2405(A)(2) (2000) (application for a video poker license "is not complete nor is it considered filed with the division unless it is submitted with the appropriate fee"); *id.* § 2409(A)(1) and (2) (requiring applicants for video poker licenses to pay, "[u]pon application, a nonrefundable annual [licensing] fee," as specified in La. Rev. Stat. Ann. § 27:311(A)).

until the license expires or until the State suspends or revokes the license for cause. The State projects its anticipated revenue from video poker licenses into the future, see, *e.g.*, *State Gaming Revenue* 1, and thus is in a position to plan its future spending based on those projections.

When the State issues a video poker license, it is effectively "selling" the license to the applicant, in return for the payments that the State has already received and the right to additional payments over the term of the license. The State is thus receiving "money or property" in exchange for the license. And the applicant is receiving something that, as explained above (see pp. 20-25, *supra*), indisputably constitutes property as to him. It would be curious to conclude that, although the transaction involves an exchange by the applicant of one form of property (*i.e.*, money) for another form of property (*i.e.*, the license), the transaction does not also involve an exchange of property for property by the State. See *United States* v. *Frost*, 125 F.3d 346, 367 (6th Cir. 1997) (holding that a state university has a property interest in an unissued degree because, *inter alia*, "in return for tuition money and scholarly effort, [the university] agrees to provide an education and a degree"), cert. denied, 525 U.S. 810 (1998); cf. *United States* v. *Novod*, 923 F.2d 970, 974 (2d Cir.) (dicta) (two judges suggest that the license award process "is tantamount to a contractual transaction where a buyer and seller agree on a mutually satisfactory exchange of consideration"), cert. denied, 500 U.S. 919 (1991).

The State's interest in a video poker license that it has not yet issued also resembles, in certain respects, a patent holder's interest in a patent that it has not yet licensed. It is well established that patents are a

"species of property." *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 642 (1999); see *Consolidated Fruit Jar Co.* v. *Wright*, 94 U.S. 92, 96 (1877) ("A patent for an invention is as much property as a patent for land."). "'A patent,' said Mr. Justice Holmes, 'is property carried to the highest degree of abstraction—a right in rem to exclude, without a physical object or content.'" *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U.S. 661, 678 (1944) (Jackson, J., dissenting) (quoting 1 Holmes-Pollock Letters 53); accord *Transparent-Wrap Mach. Corp.* v. *Stokes & Smith Co.*, 329 U.S. 637, 643 (1947) (describing a patent as "the exclusive right to make, use, and vend the invention or discovery for a limited period") (internal quotation marks omitted); see also *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979) (the right of exclusion is among "the most essential sticks in the bundle of rights that are commonly characterized as property"). Similarly, the State's rights with respect to video poker in Louisiana include the right to exclude others from that business. The State has an exclusive right (subject to any previously issued licenses) to operate the video poker business itself; the State also has the right to prohibit all other persons within the State from engaging in that business, or to condition participation on compliance with whatever requirements the State imposes. See pp. 37-39, *infra*. And, just as one of the most important attributes of a patent is the ability to exploit it for commercial gain through licensing, one of the most important attributes of Louisiana's authority over video poker is the ability to exploit it financially through licensing. In both cases, the power to license others to participate in a particular economic activity, which they could not engage in

absent the license, furthers economic interests that qualify as property.

2. In any event, the indictment in this case charged that petitioner and his co-defendants committed mail fraud by engaging in a scheme not only to obtain the video poker license for TSG, Ltd., initially in 1992, but also to obtain renewals of the license in 1993, 1994, and 1995. Superseding Indictment 26-28. The jury was instructed accordingly. Jury Instructions 27. Whether or not the State had a property interest in the license before its issuance, the State did have a property interest in the license once it had been issued, and thus became property as to the licensee.

The State has an ongoing economic stake in a video poker license issued under the Louisiana Video Draw Poker Device Control Law. As explained above, the State is entitled to an annual license fee from each video poker licensee, which ranges from $20,000 to $100 depending on the category of license, and to quarterly franchise payments based on a percentage of the net revenues from each licensed video poker device. See La. Rev. Stat. Ann. § 27:311(A) and (D). The State is thus essentially in business with the licensee so long as the license remains in effect. The State protects its interest in the business through extensive regulation and monitoring of the licensed activity, including, for example, requiring that all licensed video poker devices be linked to a central state computer so that a record can be maintained of all money taken in and paid out in winnings. See *id.* § 27:302(A)(5)(o).

Moreover, the State, not the licensee, controls the alienation of a video poker license. See La. Rev. Stat. Ann. § 27:311(G) (a video poker license "shall be personal to the licensee to whom it was issued and shall not

be transferable").[19] The State also may suspend or revoke a license at any time, if the State determines that the licensee has violated the statute or failed to satisfy the suitability requirements. *Id.* § 27:308(B) and (C). It is well settled that a right often associated with the ownership of property is the right to control its alienation. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (describing "property rights" as including the right to "dispose of" property); accord *Salvatore*, 110 F.3d at 1140; cf. *Carpenter*, 484 U.S. at 26 (concluding that the *Wall Street Journal* had a property right in controlling the dissemination of its confidential business information).

In *United States* v. *Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992), cert. denied, 507 U.S. 959 (1993), the court of appeals held that, once the City of Boston issued liquor and entertainment licenses to the defendants, the City had a property interest in those licenses for purposes of the mail fraud statute, because the licenses had to be renewed annually, could be revoked by the City based on the occurrence of prescribed contingencies, and could be transferred only with the City's approval. "[A]t the very least," the court explained, "defendants repeatedly deprived the City of Boston of its reversionary interest in the fraudulently obtained licenses by renewing and transferring the licenses in the names of straw owners." *Ibid.* Similarly, here, even if the video poker license did not become property until the State

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[19] See also, *e.g.*, La. Rev. Stat. Ann. § 27:306(E) (if an establishment licensed for video poker is sold, the purchaser must apply for a new license, although the establishment may continue to offer video poker in the interim); *id.* § 27:306(D)(2)(b) (authorizing truck stop operators that have lost their leases to transfer video poker licenses to other establishments in limited circumstances).

issued the license to TSG, Ltd., the State thereafter possessed a property interest in the license, because the State, not TSG, Ltd., retained control over whether, and in what circumstances, the license could be retained, revoked, transferred, or renewed. Petitioner and his co-defendants, by submitting license renewal applications that concealed the true owners of TSG, Ltd., deprived the State of that right.

3. A video poker license, as created under Louisiana law, may also be viewed as a franchise—that is, a right held exclusively by the government to engage in a particular business activity, which the government may exercise directly or delegate to private parties "acting under such conditions and regulations as the government may impose." *California* v. *Central Pac. R.R.*, 127 U.S. 1, 40-41 (1888); see *id.* at 40 (reciting traditional definition of a "franchise" as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject") (quoting 2 W. Blackstone, *Commentaries* 37).[20] As the Court has explained, a franchise "belong[s] to the State," which "could carry on the business itself or select one or several agents to do so." *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650, 660 (1885). A franchise, "when conferred upon the citizen," thus remains "[a] right which belongs to the government." *Borre* v. *United States*, 940 F.2d 215, 220

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[20] In *Frost* v. *Corporation Commission*, 278 U.S. 515, 520 (1929), the Court offered various examples of franchises: "the right to supply gas or water to a municipality and its inhabitants, the right to carry on the business of a telephone system, to operate a railroad, a street railway, city water works or gas works, to build a bridge, operate a ferry, and to collect tolls therefor." The Court added that "these are but illustrations of a more comprehensive list," *ibid.*, which the Court held to include the right to operate a cotton gin at issue in that case, *id.* at 520-521.

(7th Cir. 1991); accord *Maestri* v. *Board of Assessors*, 34 So. 658, 661 (La. 1903) ("a franchise is defined to be a royal privilege in the hands of a subject").[21] The Court has recognized, albeit in addressing the rights of franchisees, that franchises "have elements of property." *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 139 (1939); accord *Frost* v. *Corporation Comm'n*, 278 U.S. 515, 521 (1929).

In *Borre*, the court of appeals held that a municipality had a property interest in a cable television franchise, which the court described as "a delegation of a governmental function to private entities to be performed in the furtherance of the public welfare." 940 F.2d at 220 (quoting 1 D. Ferris et al., *Cable Television Law* § 13.13, at 13-68.11 (1990)). The court noted that the municipality could have chosen to operate the cable television franchise itself rather than award it to a private party. *Id.* at 220-221; see also *United States* v. *Italiano*, 894 F.2d 1280, 1285 n.6 (11th Cir. 1990) ("Clearly the cable television franchise held by the County of Hillsborough for the people of that county to be awarded to some commercial entity is 'property,' and the attempt by appellant to secure the cable television franchise by bribery is a scheme to deprive the county and its people of that property.").

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[21] Thus, the government retains authority over whether a franchise may be transferred. See *Louisiana* v. *Morgan*, 28 La. Ann. 482, 488 ("[T]he franchises of a railroad corporation cannot be alienated without the consent of the State which granted them. As all franchises belong exclusively to the State, no one will be permitted to possess and administer any of them without the consent of the State."), aff'd, 93 U.S. 217 (1876); accord *Branch* v. *Jesup*, 106 U.S. 468, 478 (1883) (observing that franchises "are generally inalienable" unless the government has provided otherwise).

The right to engage in the video poker business, like the right to engage in the cable television business, is a "right which belongs to the government," to be exercised by the government alone or "conferred on a citizen." *Borre*, 940 F.2d at 220. The State of Louisiana could, of course, have chosen to operate the video poker business itself. It is not unusual for States to conduct their own gaming operations—such as lotteries, keno games,[22] and sports wagering[23]—as a means of raising public revenues. Indeed, in Oregon, video poker is run by the State, which owns the video poker devices and licenses them to proprietors in return for a share of the profits. See Or. Rev. Stat. § 461.215 (1997). By contrast, Louisiana chose to confer the authority to operate video poker devices on suitable private parties. In return, the State receives valuable consideration, in the forms of initial and annual license fees and a continuing share in the revenue generated by video poker within the State, and retains a significant degree of control over the video poker industry. Indeed, by characterizing the State's share of the net proceeds from a licensed video poker device as a "franchise payment," see La. Rev. Stat. Ann. § 27:311(D), the State has indicated that it views video poker as a government franchise.

4. Petitioner contends (Br. 17-22) that the State of Louisiana has merely a regulatory interest, not a property interest, in a video poker license. He relies primarily on cases involving other sorts of government licenses, such as driver's licenses, medical licenses, and

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[22] See, *e.g.*, Md. Regs. Code title 14, § 14.01.03.12 (2000); 77 Md. Op. Att'y Gen. 82 (1992).

[23] See, *e.g.*, N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 502 (McKinney 2000) (off-tracking betting); Or. Rev. Stat. §§ 461.213, 461.543 (1997) (sports wagering).

export licenses. But the Court need not decide in this case whether a State has a property interest in all of the varieties of licenses that it issues. The Court need conclude only that the State of Louisiana has an interest in the particular variety of license at issue here —a license under which the State retains a substantial economic stake in the licensed activity. None of the cases on which petitioner relies involved such a license. See *United States* v. *Shotts*, 145 F.3d 1289, 1294 (11th Cir. 1998) (concluding that "[a] particular license may signify nothing more than an intent to regulate, while another type of license may signify the state's intent to participate in that industry") (citing *Salvatore*, 110 F.3d at 1141).

A video poker license does not constitute a mere "promise not to interfere" with the licensee's conduct of a business, profession, or other activity, as may the sorts of licenses that have been described as reflecting "a regulatory rather than property interest" on the part of the government. *E.g.*, *Toulabi* v. *United States*, 875 F.2d 122, 125 (7th Cir. 1989). As the court of appeals explained in *Salvatore*, "Louisiana has much more than a regulatory interest in the video poker licenses; it has a direct and significant financial stake in its role as issuer of the licenses." 110 F.3d at 1142. Indeed, the Seventh Circuit, after concluding in *Toulabi* that a municipality did not have a property interest in a taxi driver's license, concluded that a municipality did have a property interest in the cable television franchise, which the court found to "represent[] far more than a mere 'promise not to interfere' by the government." *Borre*, 940 F.2d at 219-221. As explained above, a video poker license is analogous to a franchise: a privilege conferred on a private party to operate a particular business in return for valuable consideration.

5. Petitioner also argues (Br. 22-26) that the Court should construe the mail fraud statute to exclude schemes to obtain a state license by fraudulent means, invoking the Court's statement in *United States* v. *Bass*, 404 U.S. 336, 349 (1971), that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Congress has left no doubt, however, that Section 1341 "reach[es] *any* scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." *Carpenter*, 484 U.S. at 27 (emphasis added); see also *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, 'any' has an expansive meaning."). In *McNally*, the Court recognized that "[t]he mail fraud statute clearly protects property rights," 483 U.S. at 356, and "is to be interpreted broadly insofar as property rights are concerned," *ibid.* Accordingly, to the extent that Louisiana has a property right in a video poker license, as created under state law, Congress has clearly expressed its purpose to protect that right under Section 1341. Cf. *Salinas*, 522 U.S. at 59-60.

Nothing in the text or history of the mail fraud statute provides any justification for varying the scope of protected property rights depending on the identity of the victim. Indeed, given that schemes to defraud a State of money or property rights often involve powerful state officials (as the indictment charged in this case), the State may not be well positioned to investigate or prosecute the fraud itself. Section 1341 is particularly necessary in such cases to protect against frauds involving the use of the U.S. mails, which have historically been an area of particular federal concern. See, *e.g.*, *In re Rapier*, 143 U.S. 110, 134 (1892) ("It is not necessary that Congress should have the power to

deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality."); see also *Badders* v. *United States*, 240 U.S. 391, 393 (1916); *Ex parte Jackson*, 96 U.S. 727 (1877).

C. Congress's Enactment Of 18 U.S.C. 1346 Has No Bearing On Any Issue Presented In This Case

Petitioner finally contends (Br. 37) that the post-*McNally* enactment of 18 U.S.C. 1346—which expanded the definition of a "scheme or artifice to defraud" under the mail, wire, and bank fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services"—"demonstrates that [Congress] did not intend the mail fraud statute to cover deceptions in state license applications." But the intent of the Congress that enacted Section 1346 in 1988 is irrelevant to any issue in this case. This case was not charged under Section 1346 as involving a scheme to deprive Louisiana or its citizens of an intangible right. The case was instead charged as involving "a scheme and artifice to defraud, and to obtain property by means of false and fraudulent pretenses and representations" in violation of 18 U.S.C. 1341 and 18 U.S.C. 2. Superseding Indictment 26, 28. The property at issue was specifically identified in the indictment as "state licenses to operate video poker sites for Truck Stop Gaming, Ltd." *Id.* at 26. The indictment nowhere mentioned Section 1346 or "intangible rights."

Congress did not purport in the post-*McNally* legislation to restrict the definition of property rights under the existing mail, wire, and bank fraud statutes. Rather, Congress included an additional category of rights, which the Court had held in *McNally* could not

be the object of a "scheme to defraud" as then understood, within the protection of those statutes. See 134 Cong. Rec. 33,297 (1988) (statement of Rep. Conyers) (Section 1346 "is intended merely to overturn the McNally decision. No other change in the law is intended.").[24]

Petitioner argues (Br. 37) that Congress would have included in Section 1346 an "intangible right * * * to run a licensing program based on full and complete information" if Congress had intended that the mail fraud statute reach schemes to obtain a government license by fraud. Petitioner reads too much into Congress's silence. Congress may have anticipated that most schemes involving fraud in license applications could be reached without further statutory addition—either under the existing mail and wire fraud statutes, at least to the extent that the scheme involved a license

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[24] Section 1346 was adopted as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, Subtitle O, § 7603(a), 102 Stat. 4508. The provision was not discussed in a committee report or debated on the floor of either House. See Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 So. Cal. L. Rev. 367, 488-489 nn.450-452 (1989) (discussing legislative history of Section 1346). The first statement quoted in the text is from Representative Conyers, the chairman of the Subcommittee on Criminal Justice of the House Judiciary Committee, which had held hearings on the impact of *McNally* on federal criminal prosecutions. See 134 Cong. Rec. at 33,296-33,297. Representative Conyers, while supporting the provision that became Section 1346, voted against the Anti-Drug Abuse Act. *Id.* at 33,318. No other member of Congress expressed any disagreement with Representative Conyers' statement that Section 1346 was not intended to effect any change in the law other than the overturning of *McNally*. See *id.* at 32,708 (statement of Senator Biden) (Section 1346 "overturns the decision in *McNally*").

in which the government had a property interest, or under the new "honest services" provision, to the extent that the scheme involved the corruption of government officials. See, *e.g.*, *United States* v. *Alkins*, 925 F.2d 541, 549 (2d Cir. 1991 (affirming mail fraud conviction of state employees and others under Section 1346 for engaging in a scheme to issue fraudulent vehicle registrations). Or Congress may (if it even recognized that any question existed) simply have chosen to address license procurement schemes at a later time, or to leave the question to the courts in the first instance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2000

APPENDIX A

Section 1341 of Title 18 of the United States Code provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX B

The mail fraud count of the superseding indictment alleged as follows:

COUNTS 3 THROUGH 6
(MAIL FRAUD)

A. THE SCHEME:

Beginning on an exact date unknown, but in or before February 1992, and continuing until the date of this indictment, in the Eastern District of Louisiana, and elsewhere, the listed defendants, and others, known and unknown to the Grand Jury, knowingly and willfully devised and intended to devise a scheme and artifice to defraud, and to obtain property by means of false and fraudulent pretenses and representations; that is, to defraud the State of Louisiana and its citizens by fraudulently obtaining and renewing, through the submission of false and incomplete information, state licenses to operate video poker sites for Truck Stop Gaming, Ltd.

It was part of the scheme and artifice to defraud, that, in connection with attempts to obtain licenses and license renewals for Truck Stop Gaming, Ltd., the defendants filed, and caused to be filed, with the Louisiana State Police applications, affidavits, and other documents which concealed and failed to disclose:

1. Understandings and agreements with unreported parties:

   a. pledging and assigning interests in Truck Stop Gaming, Ltd;

b. agreeing to hold interests in Truck Stop Gaming, Ltd., as an "agent, nominee or otherwise" on behalf of said unreported party; and

c. agreeing to transfer said interests, on some future date, to said unreported party; and

2. other factors that could impact the ability of the true owners to obtain licenses.

It was further part of the scheme and artifice to defraud that the defendants filed income tax returns which listed the GOODSON children as owning, directly and indirectly, 100% of Truck Stop Gaming, Ltd.

B. MAILINGS

On or about the dates listed below, in the Eastern District of Louisiana and elsewhere, the listed defendants, for the purpose of executing the scheme set forth above in Part A, and attempting to do so, did knowingly cause to be delivered by the United States Postal Service according to the directions thereon, and did take and receive, and cause to be taken and received from an authorized depository for mail matter, the following items having been mailed from the Department of Public Safety and Corrections, Office of Louisiana State Police, Baton Rouge, Louisiana, to

Truck Stop Gaming, Ltd., P.O. Box 1361, Slidell, Louisiana, to wit:

COUNT	DATE	DEFENDANTS	ITEM MAILED FROM/TO
3	05/18/92	CARL CLEVELAND FRED GOODSON MARIA GOODSON	License No. 5207600111, Office Tracking No. 000142, issued to Truck Stop Gaming, Ltd.
4	07/07/93	CARL CLEVELAND FRED GOODSON MARIA GOODSON JOE MORGAN	License No. 5207600111, Office Tracking No. 013616, issued to Truck Stop Gaming, Ltd.
5	06/02/94	CARL CLEVELAND FRED GOODSON MARIA GOODSON JOE MORGAN	License No. 5207600111, Office Tracking No. 020606, issued to Truck Stop Gaming, Ltd.
6	05/25/95	CARL CLEVELAND FRED GOODSON MARIA GOODSON JOE MORGAN	License No. 5207600111, Office Tracking No. 014718, issued to Truck Stop Gaming, Ltd.

All in violation of Title 18, United States Code, Sections 1341 and 2.

APPENDIX C

The district court's instructions to the jury on the mail fraud count stated as follows:

MAIL FRAUD: COUNTS 3 THROUGH 6 AND "RACKETEERING ACTS" 1a THROUGH 1d

TITLE 18, UNITED STATES CODE, SECTION 1341, MAKES IT A CRIME FOR ANYONE TO USE THE UNITED STATES MAILS IN CARRYING OUT A SCHEME TO DEFRAUD. FOUR OF THE SIX DEFENDANTS ARE CHARGED WITH MAIL FRAUD IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 1341. DEFENDANTS **CARL CLEVELAND, FRED GOODSON, AND MARIA GOODSON** ARE EACH CHARGED WITH MAIL FRAUD IN COUNTS 3, 4, 5, AND 6 AND "RACKETEERING ACTS" 1(a), 1(b), 1(c), AND 1(d). **JOE MORGAN** IS CHARGED WITH MAIL FRAUD IN COUNTS 5 AND 6 AND RICO PREDICATE ACTS 1(c) AND 1(d). THE SUPERSEDING INDICTMENT CHARGES THAT THE LISTED DEFENDANTS KNOWINGLY DEVISED A SCHEME TO DEFRAUD THE STATE OF LOUISIANA AND ITS CITIZENS BY FRAUDULENTLY OBTAINING AND RENEWING, THROUGH THE SUBMISSION OF FALSE AND INCOMPLETE INFORMATION, STATE LICENSES TO OPERATE VIDEO POKER SITES FOR TRUCK STOP GAMING, LTD. THE MAIL FRAUD CHARGES ARE SET FORTH ON PAGES 26-28 OF THE SUPERSEDING INDICTMENT.

FOR YOU TO FIND A DEFENDANT GUILTY OF THE CRIME OF MAIL FRAUD, YOU MUST BE CONVINCED THAT THE GOVERNMENT HAS PROVED

EACH OF THE FOLLOWING ELEMENTS BEYOND A REASONABLE DOUBT AS TO THAT DEFENDANT:

FIRST, THAT THE DEFENDANT UNDER CONSIDERATION KNOWINGLY CREATED A SCHEME TO DEFRAUD, AS CHARGED IN THE INDICTMENT;

SECOND, THAT THE DEFENDANT UNDER CONSIDERATION ACTED WITH A SPECIFIC INTENT TO COMMIT FRAUD;

THIRD, THAT THE DEFENDANT UNDER CONSIDERATION MAILED SOMETHING OR CAUSED ANOTHER PERSON TO MAIL SOMETHING FOR THE PURPOSE OF CARRYING OUT THE SCHEME.

A "SCHEME TO DEFRAUD" INCLUDES ANY SCHEME TO DEPRIVE ANOTHER OF MONEY OR PROPERTY BY MEANS OF FALSE OR FRAUDULENT PRETENSES, REPRESENTATIONS, OR PROMISES. THE SCHEME MUST INVOLVE FALSE OR FRAUDULENT REPRESENTATIONS OR OMISSIONS REASONABLY CALCULATED TO DECEIVE PERSONS OF ORDINARY PRUDENCE AND COMPREHENSION.

FOR THE PURPOSES OF MAIL FRAUD, A REPRESENTATION MAY BE "FALSE" WHEN IT CONSTITUTES A HALF TRUTH, OR EFFECTIVELY CONCEALS A MATERIAL FACT, PROVIDED IT IS MADE WITH INTENT TO DEFRAUD.

IT IS NOT NECESSARY THAT THE GOVERNMENT PROVE ALL OF THE DETAILS ALLEGED IN THE INDICTMENT CONCERNING THE PRECISE NATURE AND PURPOSE OF THE SCHEME, OR THAT THE MATERIAL MAILED WAS ITSELF FALSE OR

FRAUDULENT, OR THAT THE ALLEGED SCHEME ACTUALLY SUCCEEDED IN DEFRAUDING ANYONE, OR THAT THE USE OF THE MAIL WAS INTENDED AS THE SPECIFIC OR EXCLUSIVE MEANS OF ACCOMPLISHING THE ALLEGED FRAUD.

WHAT MUST BE PROVED BEYOND A REASONABLE DOUBT IS THAT THE DEFENDANT KNOWINGLY DEVISED OR INTENDED TO DEVISE A SCHEME TO DEFRAUD THAT WAS SUBSTANTIALLY THE SAME AS THE ONE ALLEGED IN THE INDICTMENT AND THAT THE USE OF THE U.S. MAILS WAS CLOSELY RELATED TO THE SCHEME, IN THAT THE DEFENDANT EITHER MAILED SOMETHING OR CAUSED IT TO BE MAILED IN AN ATTEMPT TO EXECUTE OR CARRY OUT THE SCHEME. TO "CAUSE" THE MAILS TO BE USED IS TO DO AN ACT WITH KNOWLEDGE THAT THE USE OF THE MAILS WILL FOLLOW IN THE ORDINARY COURSE OF BUSINESS OR WHERE SUCH USE CAN REASONABLY BE FORESEEN. EACH SEPARATE USE OF THE MAILS IN FURTHERANCE OF A SCHEME TO DEFRAUD CONSTITUTES A SEPARATE OFFENSE.